

**SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR**

**APPLICATION OF LAS BRISAS
ENERGY CENTER, LLC
FOR STATE AIR QUALITY PERMIT;
NOS. 85013, HAP48, PAL41,
AND PSD-TX-1138.**

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**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

**APPLICANT LAS BRISAS ENERGY CENTER LLC'S

REPLY TO EXCEPTIONS TO THE

ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

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ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW Applicant Las Brisas Energy Center, LLC ("*Applicant*" or "*Las Brisas*") and, pursuant to 30 Tex. Admin. Code § 80.257(a), files this reply to exceptions to the Administrative Law Judges' ("*ALJs*") Proposal for Decision ("*PFD*") filed by the Texas Commission on Environmental Quality ("*TCEQ*") Executive Director and Protestants Environmental Defense Fund ("*EDF*") and Sierra Club in the above-captioned matter. For the reasons discussed in more detail below, the administrative and evidentiary record clearly justifies granting Las Brisas's permit to construct the Las Brisas Energy Center ("*LBEC*"). Nonetheless, should the Commission determine that more information is needed before the permit is granted, the Commission has two options for eliciting that information from Applicant, neither of which, despite Protestants' claims, involves or requires submittal of a new permit application.

I. ARGUMENT

A. THE COMMISSION SHOULD ISSUE LAS BRISAS'S PERMIT WITHOUT UNNECESSARY DELAY

Pursuant to TCEQ's air permitting regulations, to be granted an air permit an applicant must demonstrate, among other things, that (1) emissions from the facility will comply with all TCEQ rules and regulations and with the intent of the Texas Clean Air Act, including protection of the health and property of the public, and (2) the proposed facility will utilize best available control technology ("**BACT**").¹ Additionally, TCEQ's prevention of significant deterioration ("**PSD**") permitting rules require applicants to submit a source impact analysis demonstrating that emissions from the proposed source will not cause or contribute to air pollution in violation of any national ambient air quality standard ("**NAAQs**") or PSD increment.²

As the ALJs note in their PFD, a permit applicant has the burden of proving, by a preponderance of the evidence, that it will satisfy each of these permitting requirements.³ The PFD, which necessarily focuses on the limited number of discrete "issues" identified by the Protestants⁴ as further narrowed by the focus of the ALJs, masks the fact that Las Brisas has unquestionably proven that the LBEC will comply with the vast majority of applicable requirements. Furthermore, despite this masking effect, even a review of the PFD itself reveals that Las Brisas has shown by a preponderance of the evidence that the

¹ See 30 TEX. ADMIN. CODE §§ 116.111(a)(2)(A)(i), 116.111(a)(2)(C).

² See 30 TEX. ADMIN. CODE §§ 116.160(c)(2)(B) (incorporating by reference 40 C.F.R. § 52.21(k) concerning source impact analysis).

³ See PFD at 6.

⁴ See *id.*

LBEC will comply with the overwhelming majority of requirements for obtaining an air permit.

Specifically, there is just no question that Las Brisas has shown, through its source impacts analysis, that emissions from the LBEC will not cause or contribute to a violation of the annual NAAQS for nitrogen dioxide (“*NO₂*”), the 1-hour and 8-hour NAAQS for carbon monoxide (“*CO*”), the 24-hour and annual NAAQS for particulate matter with a diameter of 10 micrometers or less (“*PM₁₀*”),⁵ the 3-hour, 24-hour, and annual NAAQS for sulfur dioxide (“*SO₂*”), the 8-hour NAAQS for ozone, the annual PSD increments for *NO₂* and *PM₁₀*, and the 3-hour, 24-hour, and annual PSD increments for *SO₂*.⁶ Las Brisas has further demonstrated that the LBEC emissions will be protective of public health and property by demonstrating compliance with TCEQ’s ambient standards for *SO₂*, sulfuric acid, and lead,⁷ and also by comparing ambient concentrations of more than twenty compounds that will be emitted by the LBEC to their short- and long-term effects screening levels or ESLs.⁸ In the end, even if the air dispersion modeling and material handling “issues” identified by the ALJs are regarded by the Commission as valid (which, as explained in Las Brisas’s Exceptions to the PFD, they are not), the ALJs’ concerns regarding these issues are confined to a *single* modeling demonstration – the 24-hour PSD increment for *PM₁₀*.

⁵ And through application of the Surrogacy Policy, *PM_{2.5}* as well. See Las Brisas’s Closing Argument at 24-27; PFD at 47.

⁶ See Las Brisas Ex. 12 at 2; Las Brisas Ex. 7 at 60.

⁷ See *id.*

⁸ See Las Brisas Ex. 7 at 63.

It also is undisputed that Las Brisas has proven that the LBEC circulating fluidized bed (“*CFB*”) boilers will meet BACT for NO_x, SO₂, VOC, filterable particulate matter, hydrogen chloride, hydrogen fluoride, lead, and ammonia emissions.⁹ Las Brisas also has proven, without question, that the auxiliary boilers, propane vaporizers, material handling facilities, diesel-fired engines, storage tanks, fugitive components, and cooling towers will each employ BACT for all pollutants emitted by those sources.¹⁰ Here again, even if the BACT “issues” identified by the ALJs are regarded by the Commission as valid (which, as explained in Las Brisas’s Exceptions to the PFD, they are not), the ALJs’ BACT concerns boil down to emissions of a *single* pollutant, mercury, from the CFB boilers.¹¹

In summary, if the Commission accepts the ALJs’ proposals, there are only three discrete issues that remain outstanding: compliance with the 24-hour PSD increment for PM₁₀, the proper mercury BACT emission limit for the CFB boilers, and whether the CFB boilers are subject to case-by-case MACT review. As explained below, should the Commission give merit to the ALJs’ recommendations regarding these issues, the Commission has more than one procedural option by which to address them. Denial of the permit, however, is not one of those options. Instead, as explained in the Executive Director’s Exceptions, the options available to the Commission include the report approach described in Tex. Health & Safety Code § 382.0518, and reopening the record

⁹ See Las Brisas Ex. 6 at 41-47.

¹⁰ See *id.* at 47-51.

¹¹ Las Brisas’s Exceptions to the PFD explained why the ALJs’ concerns regarding the proposed limits for total PM/PM₁₀ and CO emissions from the CFB boilers also are unfounded based on the record evidence. However, as compared to the ALJs’ errors in evaluating the proposed mercury emission limit for the CFB boilers, their errors regarding total PM/PM₁₀ and CO emissions are much less substantial.

as contemplated by TCEQ's rules at 30 Tex. Admin. Code § 80.265. While the Commission's authority to pursue each of those options is explained in the sections that follow, as an initial matter Las Brisas notes that neither option is necessary and may, to a degree, contradict the Commission's statutory obligation to issue this permit in a reasonable time.¹² Said differently, the Commission should not feel obligated to remand any issue for further evidentiary proceedings before the State Office of Administrative Hearings ("**SOAH**") if the outcome of such a remand is already known.

In order to properly evaluate and choose among the Commission's options in proceeding on this matter it is critical to first consider the basis upon which the Commission can render its decision. On this topic the Texas Clean Air Act is clear – the Commission is *not* limited to the evidentiary record established through a contested case hearing. Instead, the Commission's decision to grant an air permit is to be made based on "the information available to the commission."¹³ As explained below, considering the information that is now available, there is no need for the Commission to issue a report or open the record for additional evidence.

With respect to the question of compliance with the 24-hour PSD increment for PM₁₀, as Las Brisas explained in its Exceptions, information available to the Commission addresses each of the ALJs' concerns. First, any questions regarding the appropriateness of the moisture content adjustment taken by Las Brisas in its modeling of the Port of Corpus Christi Authority ("**POCCA**") Bulk Dock 2 operations is now moot because of POCCA's recent alteration of Permit No. 9498. Specifically, on April 12, 2010, POCCA

¹² See TEX. HEALTH & SAFETY CODE § 382.0518(b).

¹³ *Id.*

lowered its permitted hourly PM₁₀ emission rate to 7.58 pounds per hour (“*lbs/hr*”),¹⁴ a rate that is significantly less than the 14.07 lbs/hr modeled by Las Brisas.¹⁵ Second, any question regarding whether Las Brisas failed to consider secondary emissions associated with off-site material handling operations also is answered by POCCA’s alteration because the difference between the 14.07 lbs/hr PM₁₀ modeled by Las Brisas and the revised POCCA Bulk Dock 2 PM₁₀ emission limit of 7.58 lbs/hr ($14.07 - 7.58 = 6.49$ lbs/hr) is more than sufficient to account for any emissions that might be associated with the off-site material handling operations, which even EDF’s witness Mr. Michael Hunt calculated at only 2.35 lbs/hr.¹⁶ Third, the ALJs’ concerns regarding “mislocated” sources in Las Brisas’s modeling were addressed by the modeling introduced by Las Brisas during the contested case hearing as part of its rebuttal case.¹⁷

With respect to BACT for mercury, the issue, to the extent one exists, relates to the mercury content of the petroleum coke to be fired in the LBEC CFB boilers. As explained in Las Brisas’s prior briefing on this topic, the specific sources and, as a result, the exact characteristics of the petroleum coke to be used at the LBEC cannot be known at this time.¹⁸ Accordingly, opening the record for more evidence on this topic would serve no purpose. Fortunately, however, because of its continuous mercury emission

¹⁴ See Las Brisas’s Exceptions to the PFD Att. D.

¹⁵ See Las Brisas Ex. 37.

¹⁶ See Las Brisas Ex. 37.

¹⁷ See Las Brisas Ex. 65.

¹⁸ See Trial Tr. 2138:1-4 (Smith) (explaining that petroleum coke is generally sold on a very short-term basis, on a spot-market, generally through commitments that last for one quarter in time.); Sierra Club Ex. 320 at 5 (“In reality, even within fuel grade petroleum coke there are substantial differences in fuel characteristics depending on source of crude oil and coking method.”).

monitoring requirement and optimization clause,¹⁹ the permit itself will ensure that any needed lowering of the mercury emission limit occurs once the LBEC CFB boilers are operational.²⁰

Finally, there is the question of whether the petroleum coke-fired LBEC CFB boilers were required to undergo a case-by-case MACT review. As explained in Las Brisas's Exceptions, a review of the most relevant EPA actions – EPA's MACT standard for industrial boilers, EPA's 2000 Listing Decision, and EPA's proposed MACT standards for coal- and oil-fired electric utility steam generating units ("*EUSGUs*") – clearly reveals that the petroleum coke-fired CFB boilers are *not* subject to case-by-case MACT requirements either as industrial boilers or coal- or oil-fired EUSGUs. Nevertheless, should the Commission somehow disagree and decide to require that a case-by-case MACT analysis be performed, such an analysis can be performed separately and distinctly from the issuance of the state new source review ("*NSR*") and PSD permit.²¹ In other words, even if the Commission decides that a case-by-case MACT review is required, such a decision should not preclude or even delay issuance of the state NSR and PSD permit.

¹⁹ See Las Brisas Ex. 31 at 72, 80.

²⁰ As noted in the Executive Director's Exceptions, the U.S. EPA's Environmental Appeals Board has found, on more than one occasion, that use of an optimization clause to address uncertainty in setting emission limits is a reasonable approach. See Executive Director's Exceptions to the PFD at 13-15.

²¹ TCEQ's air permitting rules clearly contemplate case-by-case MACT permitting as separate and distinct from state NSR and PSD permitting. Specifically, the requirements for obtaining a case-by-case MACT permit are contained in Subchapter E of 30 Tex. Admin. Code Chapter 116, whereas the state NSR and PSD air permitting requirements are contained in Subchapter B.

B. OTHER OPTIONS FOR THE COMMISSION: ISSUE A REPORT OR REOPEN THE EVIDENTIARY RECORD FOR FURTHER PROCEEDINGS

1. Section 382.0518 of the Texas Health And Safety Code Requires Issuance Of A Report and Provides An Applicant An Opportunity to Address Issues In The Current Application.

Portions of § 382.0518 relevant to Las Brisas's application for a Texas air quality construction permit are set forth below for convenient reference with emphasis added:

(a) Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit or permit amendment from the commission.

(b) The commission *shall*²² *grant within a reasonable time* a permit or permit amendment to construct or modify a facility if, *from the information available to the commission*, including information presented at any hearing held under Section 382.056(k), the commission finds:

(1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and

(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.

(c) [authorizing the Commission to consider the applicant's compliance history];

(d) If the commission finds that the emissions from the proposed facility will contravene the standards under Subsection (b) or will contravene the intent of this chapter, the commission may not²³ grant the permit, permit amendment, or special permit and shall set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.

²² The Texas Code Construction Act provides that "'Shall' imposes a duty." TEX. GOV'T. CODE § 311.016 (2).

²³ The Texas Code Construction Act provides that "'May not' imposes a prohibition and is synonymous with 'shall not.'" TEX. GOV'T. CODE § 311.016 (5).

(e) If the person *applying* for a permit, permit amendment, or special permit makes *the alterations* in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit, permit amendment, or special permit. If the person fails or refuses to alter the plans and specifications, the commission may not grant *the* permit, permit amendment, or special permit. The commission may²⁴ refuse to accept a person's new application until the commission's objections to the plans *previously submitted* by that person are satisfied.²⁵

a. Texas Health And Safety Code § 382.0518 Applies To The LBEC Permit.

In their respective exceptions to the PFD, Protestants EDF and Sierra Club offer differing interpretations of subsections (d) and (e). Indeed, although it seems half-hearted and is clearly without basis in law or fact, EDF argues that the application is so fundamentally flawed that § 382.0518 does not apply at all. Tellingly, EDF provides no legal basis²⁶ or cognizable criteria to support its claim that there are requirements Las Brisas must meet, that have been identified by the ALJs, and that are so “fundamental” as to be outside of the *only* requisite Commission findings specifically set forth in § 382.0518(b)(1) and (2), above. Moreover, EDF offers no guide to the fundamental requirements that are not found in statute but relieve the Commission of its non-

²⁴ The Texas Code Construction Act provides that “‘May’ creates discretionary authority or grants permission or a power.” TEX. GOV’T. CODE § 311.016 (1).

²⁵ TEX. HEALTH & SAFETY CODE § 382.0518(a)-(e) (emphasis added). Subsections (f) through (i) are not relevant to the exceptions and Applicant’s reply to exceptions. Subsection (f) relates to operation of a facility, which is not yet applicable; subsection (g) clarifies that the LBEC is a new facility under the statute, which is not an issue in this matter; subsection (h) excludes certain applications from notice requirements, none of which apply to the LBEC; and subsection (i) relates to permit amendments, which Las Brisas has not proposed. *See id.* § 382.0518(f)-(i).

²⁶ EDF’s “legal basis” for not applying § 382.0518 ultimately seems tied to a legally incorrect and otherwise unsupportable view of available “equitable” relief because Applicant proceeded to hearing in the face of opposition motions for summary disposition that, incidentally, were denied, and vague notions of notification through its discovery responses that Applicant should proceed at its own risk. However, TCEQ is not a court sitting in equity. It is a statutorily created entity that is bound to follow the law as set forth by the state legislature. *See* TEX. WATER CODE § 5.051 (“The [Commission] is created as an agency of the state.”).

discretionary statutory duty to issue the permit.²⁷ As detailed above, the unquestionably satisfied overwhelming number of applicable requirements, clearly acceptable modeling results for numerous types of emissions, and unchallenged BACT determinations for most facilities proposed for the LBEC belie EDF's rhetoric and exaggeration of the relatively few remaining issues to the point that no further response is warranted here.

Similar in sentiment but fundamentally at odds with EDF as to the applicability of § 382.0518, Sierra Club lends its "exceptions" to the PFD to the preposterously overblown claim that "[i]f ever there was a permit worth denying, LBEC's application for a 1200 megawatt petroleum coke-fired power plant in Corpus Christi would be it."²⁸ Then, inappropriately detouring through a litany of unproven threats of "imminent" ozone non-attainment, benzene emissions, and environmental justice claims that are not mentioned in the PFD much less in issue, Sierra Club rants that Las Brisas should have "stepped up" to meet Sierra Club's view of what would be appropriate in the application for the LBEC on a list of vigorously disputed issues.²⁹ These unsupported claims are beyond what should legitimately be considered "exceptions to the PFD."

Despite its effort to distract with unsupported hyperbole, in the legitimate analysis contained in its exceptions, Sierra Club emphatically disagrees with EDF's position that § 382.0518 does not apply, stating: "[t]he ALJs correctly note that Texas Health and Safety Code § 382.0518 applies to this air permitting case."³⁰ Sierra Club is clearly correct on this point and the reality is that § 382.0518 controls the issuance of the permit in this

²⁷ TEX. GOV'T. CODE § 311.016 (2).

²⁸ See Sierra Club's Exceptions to the PFD at 1.

²⁹ See *id.* at 1-2.

³⁰ *Id.* at 4.

case. Unfortunately, the accuracy of Sierra Club's analysis of the Commission's options ends as quickly as it begins and, in spite of how differently each gets there, both EDF's and Sierra Club's exceptions eventually harmonize to the point of offering legal analysis concluding that the Commission must deny the current Las Brisas air permit and require a new application.³¹ However, for the reasons set forth below, each of these Protestants' routes to this conclusion is misguided and, at their base, each argument ignores the plain wording of the controlling statute, namely § 382.0518.

Before addressing directly the plain wording of § 382.0518, it is appropriate to dispense with EDF's rather obvious misapplication of Tex. Health & Safety Code § 382.0291, which is entitled "Public Hearing Procedures." As suggested by the title to this section, this portion of the Texas Clean Air Act simply has no applicability whatsoever to an application after a contested hearing has been held. EDF's attempt to juxtapose a procedural statute that, in relevant part, merely prevents a last-minute amendment to an air permit application in the 31-day period prior to hearing and does not in anyway address hearing or post-hearing procedure, much less disposition of an air permit pursuant to § 382.0518, must fail. The two statutes simply relate to different parts of the permit process and are not in any relation. Furthermore, EDF's attempt to selectively quote § 382.0291 and, thereby, bury the lede, demonstrates that it is beyond question that this provision has no relationship or applicability to the Commission's decision in this matter. EDF's strains to put the two sections together are without any legal support whatsoever.

³¹ See EDF's Exceptions to the PFD at 4; Sierra Club's Exceptions to the PFD at 5.

Similarly, Sierra Club's attempt to draw a parallel from a section of the Texas State Implementation Plan ("**SIP**") addressing an appeal to the Texas Air Control Board of a decision of the Executive Secretary to deny a permit as evidence of a "longstanding interpretation" of § 382.0518 must fail for lack of a connection. This portion of the SIP simply bears no relationship to the current TCEQ permit process or this case and Sierra Club's assertion that it amounts to a controlling interpretation is without merit. Furthermore, Sierra Club's first SIP reference favors the literal interpretation of current § 382.0518 discussed below, namely, that the Commission has "[t]he legal authority to prevent construction, modification, or operation of any stationary source"³² by not issuing,³³ as opposed to denying,³⁴ a permit.

b. Protestants' Arguments Violate The Rules Of Proper Statutory Interpretation.

It is axiomatic that proper statutory interpretation requires a construction of the statute that gives meaning to all of its various parts. Any interpretation of a statute must "give effect to all words of a statute, and, if possible, . . . not treat any statutory language as mere surplusage."³⁵ "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

³² See Sierra Club's Exceptions to the PFD at 5-6.

³³ The Texas Code Construction Act provides that "'May not' imposes a prohibition and is synonymous with 'shall not.'" TEX. GOV'T. CODE § 311.016 (5).

³⁴ The Texas Legislature explicitly authorized "denial" of a permit application in other provisions of the Texas Clean Air Act. See, e.g., Tex. Health & Safety Code § 382.0591 ("The commission shall *deny* an application . . .") (emphasis added); § 382.05199(h) (authorizing the Executive Director to "approve or deny [an] application"); § 382.0543 (contemplating the Commission's failure "to issue or deny the renewal permit"); § 382.0561 (contemplating the Commission's preliminary decision to "issue or deny a permit"); § 382.0566(b) ("The commission shall issue a final order issuing or denying the permit . . .").

³⁵ *Continental Cas. Ins. Co. v. Functional Restoration Ass'ns.*, 19 S.W.3d 393, 402 (Tex. 2000).

insignificant.”³⁶ Protestants EDF and Sierra Club focus exclusively on subsections (d) and (e) in urging the Commission to “deny” Las Brisas’s permit application,³⁷ but a reading of this statute that ignores its other applicable requirements is impermissible.

In particular, subsection (b) is critical to the discussion of whether the Commission need issue a report at all.³⁸ Unlike the ALJs, the Commission is not constrained by the administrative and evidentiary record, but is authorized to consider any “information available to the commission, including information presented at any hearing held under Section 382.056(k) [regarding public meetings].”³⁹ Accordingly, no further action is necessary for the Commission to consider other information available to the agency such as the POCCA Dock 2 permit alterations submitted to TCEQ earlier this year and included with Las Brisas’s Exceptions as Attachment D.

The POCCA Dock 2 permit alterations eliminate any potential need for additional evidence of the application’s compliance with the PM₁₀ 24-hour increment. As indicated earlier, although the POCCA Dock 2 permit originally included a PM₁₀ emission rate of 68 lbs/hour, Applicant’s expert witness Mr. Joseph Kupper modeled a PM₁₀ emission rate of 14.07 lb/hr⁴⁰ for Dock 2 after adjusting the moisture content of the materials handled to reflect the 2002 amendment to the permit.⁴¹ However, after making additional

³⁶ *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted).

³⁷ See EDF’s Exceptions to the PFD at 4; Sierra Club’s Exceptions to the PFD at 5.

³⁸ Although not specifically briefed by any party, no one disagrees that Las Brisas “must obtain a permit . . . from the commission” before construction of the new facility begins. See TEX. HEALTH & SAFETY CODE § 382.0518(a).

³⁹ TEX. HEALTH & SAFETY CODE § 382.0518(b).

⁴⁰ See Las Brisas Ex. 37.

⁴¹ See Las Brisas Ex. 7 at 150-69.

alterations to its permit including explicitly increasing the moisture content to 4.8% and removing emission sources duplicated in tenants' NSR permits, the POCCA requested a maximum hourly emissions limit of 7.85 lbs/hr for PM₁₀ based on maximum operating scenarios.⁴² This emissions limit is just over half the rate originally modeled by Mr. Kupper, which nonetheless demonstrated that the PM₁₀ 24-hour increment would not be exceeded.⁴³ Therefore, not only was Mr. Kupper's use of 4.8% moisture content appropriate, but Applicant's direct case modeling also demonstrated that it sufficiently accommodated any emissions associated with off-site material handling operations at the POCCA. Any other remaining issues regarding Applicant's air dispersion modeling have already been addressed by evidence admitted at the hearing on the merits, namely Applicant's rebuttal modeling.⁴⁴

Additionally, subsection (b) provides the only standards for being issued a permit under § 382.0518: (1) a demonstration that the facility will use BACT, and (2) that the emissions from the facility will not "contravene the intent" of Chapter 382, "including protection of the public's health and physical property."⁴⁵ Therefore, at least for the purposes of the PSD and NSR air permit, any issues that would justify the Commission not granting a permit must fall within the scope of (b)(1) and (2). Because, as explained above, there are no BACT requirements at issue and the application demonstrates that the LBEC can comply with all applicable air quality standards including the PM₁₀ 24-hour

⁴² See Applicant's Exceptions to the PFD, Att. D (April 12, 2010 letter to TCEQ, March 2010 Alteration to Permit No. 9498 Att. A).

⁴³ See PFD at 61.

⁴⁴ See Las Brisas Ex. 65.

⁴⁵ See TEX. HEALTH & SAFETY CODE § 382.0518(b).

increment, no issues remain that would prevent the Commission from granting the NSR and PSD permit.

If, however, the Commission decides additional information from Applicant is required, the statute outlines the appropriate procedure for requesting and considering such information in subsections (d) and (e). Because both EDF and Sierra Club fail to quote directly and completely from the statute, it is appropriate to set forth below the provisions of § 382.0158(e), which address an applicant's responses to a report issued by the Commission pursuant to paragraph (d), in full, but broken into its three component sentences:

If the person *applying* for a permit, permit amendment, or special permit makes the *alterations* in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit, permit amendment, or special permit.

If the person fails or refuses to alter the plans and specifications, the commission may not grant the permit, permit amendment, or special permit.

The commission may refuse to accept a person's new application until the commission's objections to the plans previously submitted by that person are satisfied.⁴⁶

The first point to make in interpreting the statute is that use of the word “applying” in the first sentence most logically refers to the application that is pending because it also refers to alterations to existent plans and specifications. Concomitantly, if the third sentence requires a new application addressing the Commission's report, there is nothing to alter in the new application because presumably it would already incorporate the changes or it would be refused by the agency. Additionally, if an applicant were

⁴⁶ TEX. HEALTH & SAFETY CODE § 382.0518(e) (emphasis added).

always required to submit a new application in response to a report, as urged by Protestants, a recalcitrant person's new application would presumably be rebuffed at the door and there would be no application pending that the Commission *could* grant and the second sentence is rendered unacceptably nonsensical.

To make the point as plain as possible, should the Commission accept the ALJs' recommendation to not issue the permit and instead choose to issue a report – which the Commission should not do – and if Protestants are correct that Las Brisas must file a new application to address the report, then the first and second sentences of the controlling statute are superfluous, which they cannot be. Specifically, an interpretation that Las Brisas must file a new application to address issues in a Commission report obviates the need for the first two sentences such that the statute could read as set forth below without changing the meaning argued by the Protestants:

(d) If the commission finds that the emissions from the proposed facility will contravene the standards under Subsection (b) or will contravene the intent of this chapter, the commission may not grant the permit, permit amendment, or special permit and shall set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.
[unchanged]

(e) The commission may refuse to accept a person's new application until the commission's objections to the plans previously submitted by that person are satisfied.

Therefore, the only reading of this paragraph that is true to the most fundamental of rules of statutory interpretation, as set forth above, and gives meaning to all three sentences is an interpretation that would allow correction of the current permit application. Thus, by law, if the Commission opts to issue a report, Las Brisas has the opportunity and right under law to correct the aspects of its permit application that are of concern to the Commission.

It is also illustrative of this point to follow Protestants' arguments pertaining to a new application to their logical conclusion. If the Commission shall not issue a permit that fails to meet the specific requirements of its report and it can refuse an application that does not do so, it is equally true that it must issue a permit based on an application that meets the specific requirements of its report. Given then that such a permit "shall" be approved by the Commission regardless of the input received through another round of public participation, one should consider the futility in exposing a new application to the full permit review process. If in the Commission's view the new application meets the specifics of the Commission's report, subjecting the application to public comment and a contested case hearing when clearly the Commission must issue the permit under the first sentence of the paragraph would be useless. Any construction of the statute that leads to such an absurd result cannot be correct.

It is a certainty that Protestants would complete their argument that a new application must go through a full and meaningful public participation process but they offer no discussion of the mandate to issue the permit if the report is satisfied. Thus, Protestants' argument is self-defeating and it is actually an argument against the interpretation urged by Protestants to suggest that a new application, subject to a full process is required. Furthermore, the interpretation that a new application is not required is confirmed by the Executive Director, at least to the point that the Executive Director does not see additional public participation available through the Commission report process.⁴⁷

⁴⁷ See Executive Director's Exceptions to the ALJs' PFD at 4 ("However, application of this process would eliminate further hearing (and probably notice) before the ALJs.").

In conclusion, the Commission may withhold issuance of this permit only for the two reasons stated in § 382.0518(b)⁴⁸ and the specifics of the report must relate to one or both of the reasons that can prevent issuance. Las Brisas, by law, is afforded the opportunity to address issues raised in such a report in the context of the pending application.

2. Alternatively, The Commission May Reopen The Evidentiary Record Under 30 Tex. Admin. Code § 80.265.

As noted in the Executive Director's Exceptions, another option available to the Commissioners is to order the ALJs "to reopen the record for further proceedings on specific issues in dispute" as allowed by 30 Tex. Admin. Code § 80.265. Las Brisas agrees that this clearly is an option for the Commissioners, as supported by the Executive Director, but it is not necessary or required.

As previously explained, the Commission is not limited to considering the evidentiary record established through a contested case hearing when granting an air permit. Instead, the decision to grant an air permit is to be based on "the information available to the commission." Accordingly, there is no need to reopen the record in this matter for further proceedings because, as discussed above, the information available to the Commission is sufficient to warrant permit issuance. Nevertheless, should the Commission deem it appropriate to reopen the record in this proceeding so that POCCA's recent permit alteration can be included in the evidentiary record, this clearly would not require a remand to SOAH for further evidentiary proceedings, much less a remand to the Executive Director.

⁴⁸ The MACT issue or HAP permit is covered by a different process. Therefore, it is not and cannot be a basis for withholding issuance of this permit.

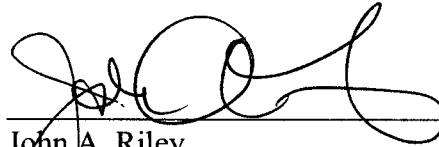
POCCA's allowable emission rates set by the recent permit alteration alone, which are unquestionable matters of fact available in the TCEQ's records, should address the ALJs' concerns regarding compliance with the 24-hour PSD increment for PM₁₀ and there simply is no other information lacking from the record that is needed to address the issue. And, to the extent that there is any remaining concern pertaining to modeling of those significantly reduced allowable emission rates, the results of Las Brisas's rebuttal modeling, concerning the 24-hour PSD increment, are available in the evidentiary record and provide substantial evidence of compliance with that standard. Furthermore, should the Commissioners determine that a case-by-case MACT review is required for the petroleum coke-fired LBEC CFB boilers, this review can and should be performed as part of an entirely separate permit application and need not delay the issuance of the state NSR and PSD permit.

II. CONCLUSION

As set forth more fully above and in Applicant's previous briefs, Las Brisas proved compliance with all applicable statutory and regulatory requirements. Accordingly, its permit application to construct the LBEC should be granted by the Commission without further delay. Accordingly, Las Brisas respectfully requests that the Commission issue an order adopting Las Brisas's proposed findings of facts and conclusions of law as filed with SOAH on February 1, 2010, and granting TCEQ State Air Quality Permit Nos. 85013, HAP48, PAL41, and PSD-TX-1138, as drafted by the Executive Director. If, however, the Commission determines that additional information is needed, it is statutorily authorized to issue a report directing Applicant to make

changes to its Application or reopen the record and instruct SOAH as to further proceedings.

Respectfully submitted,

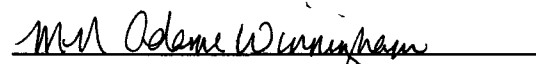
A handwritten signature in black ink, appearing to read 'John A. Riley', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Applicant Las Brisas Energy Center, LLC's Reply to Exceptions to the Administrative Law Judges' Proposal for Decision has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 29th day of April, 2010.


Nikki Adame Winningham

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SOAH DOCKET NUMBER: 582-09-2005

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